



2002-001

KANSAS

Bill Graves
Governor

OFFICE OF THE SECURITIES COMMISSIONER

David Brant
Commissioner

November 8, 2001

Raymond J. Gaskill
7 Westport
Irvine, California

Re: Request for Opinion No. 2002-001,
Sale of Timeshare Interests
File No. 2002X0000029

Synopsis: The sale of timeshare interests does not constitute the sale of securities where the purchaser's bone fide motivation is the purchase of the timeshare interest for personal use and enjoyment. Additionally, land on which there is a residential, commercial, or industrial building, or as to which there is a legal obligation on the part of the seller to construct such a building within two years are exempt from registration under the Uniform Land Sales Practice Act pursuant to K.S.A. 58-3303(a)(3).

Dear Mr. Gaskill:

You have requested an opinion concerning the sale of timeshare interests in Eldorado Resorts, Corp., a Florida Corporation developing a timeshare resort in Las Vegas, Nevada known as The Cliffs at Peace Canyon. I incorporate by reference the facts as represented in your letter and materials dated October 30, 2001.

To determine whether a timeshare interest is a security, our agency applies the test for an investment contract that was originally adopted in *S.E.C. v. Howey*, 328 U.S. 295 (1946), and was applied to condominium interests in *S.E.C. Release 5347*, dated January 4, 1973. Within the context of a timeshare interest, the outcome of the Howey test typically hinges on whether the seller's primary marketing emphasis is upon the economic benefits to the purchaser that is derived through the efforts of the timeshare management, or whether the purchaser's bone fide motivation is the purchase of the timeshare interest for personal use and enjoyment. If the true thrust of the transaction is personal use and enjoyment of the property, the timeshare interest is not a security because the purchase is not in the nature of an investment and there is no significant expectation of profits.

From your materials it appears that the timeshare units are promoted for personal use rather than investment value.

Staff concludes that the sale of timeshares in The Cliffs at Peace Canyon does not involve the sale of a security as that term is defined and used in the Kansas Securities Act. Therefore, our agency will take no enforcement action if the interests are offered and sold in Kansas without registration under the Kansas Securities Act.

Your October 20, 2001, letter includes a statement that there are already 176 units located at the timeshare site. 30 of these units are intended to be used as timeshares immediately and all units will be used as timeshares in the future. Pursuant to the K.S.A. 58-3303(a)(3), the Uniform Land Sales Practices Act creates an exemption from registration for dispositions of land upon which there is a residential, commercial, or industrial building, or as to which there is a legal obligation on the part of the seller to construct such a building within two years. As there are already buildings in existence, staff concludes that the proposed sales fall within this provision. Accordingly, the sales are exempt from the provisions of the Kansas Uniform Land Sales Practices Act, and this agency will take no action against the developer if it proceeds with the offer and sale of timeshare interests without registering under the Act.

This opinion is based upon the facts as represented in your letter. Any variance from those facts could result in a different conclusion. You are advised that this opinion is intended solely as an expression of enforcement policy and is not binding on any court or other tribunal.

Sincerely,

A handwritten signature in cursive script, reading "Wiley B. Kannarr".

Wiley B. Kannarr
Associate General Counsel